

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,

Plaintiff,

v.

TYSON FOODS, INC., *et al.*,

Defendants.

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Case No. 4:05-CV-329-GKF-PJC

**STATE OF OKLAHOMA'S REPLY TO DEFENDANT PETERSON FARMS, INC.'S
RESPONSE (DKT. # 2145) TO THE STATE'S MOTION FOR PARTIAL SUMMARY
JUDGMENT (DKT. # 2062)**

The State of Oklahoma respectfully submits this as its Reply in support of its Motion for Summary Judgment, DKT # 2062, particularly with respect to Defendant Peterson Farms, Inc.’s Response to the Plaintiffs’ [sic] Motion for Partial Summary Judgment, DKT # 2145.¹

I. Introductory statement.

Peterson Farms, Inc. (Peterson) responds separately to the State’s motion for partial summary judgment, DKT # 2062, at times joining in the Tyson Statement of Undisputed Facts, DKT. # 2119-2, and at times attempting to raise Peterson-specific factual disputes. Peterson fails to establish a genuine question of material fact to avoid summary judgment against it and the State is entitled to judgment as a matter of law.

II. NRCS Code 590 does not authorize application of waste that pollutes, or threatens to pollute, Oklahoma’s waters

Peterson incorrectly claims the Oklahoma -- Natural Resources Conservation Service (NRCS) Conservation Practice Standard for Nutrient Management -- Code 590, DKT #2145-2, is the “applicable standard adopted by the Oklahoma Legislature to govern the land application of poultry litter”. *See* DKT 2145, pp. 2, 12-13, Facts ¶¶ 5, 35-38. The Oklahoma Registered Poultry Feeding Operations Act (ORFPO Act) contains numerous standards and requirements governing the land application of poultry waste and mandates compliance with all provisions of the ORFPO Act. Defendants’ attempt to single out one of these provisions and label it as the governing standard is contrary to the plain language of the ORFPO Act itself. For example, the ORFPO Act states that: “[a]ll poultry feeding operations shall utilize Best Management Practices

¹ The State incorporates herein its Reply to “Defendant Tyson Poultry, Inc.’s Opposition to Plaintiffs’ [sic] Motion for Partial Summary Judgment with regard to Plaintiffs’ [sic] Claims under CERCLA and RCRA, DKT # 2253, its Reply to “Defendant Cobb-Vantress, Inc.’s Opposition to Plaintiffs’ [sic] State law and Federal Common Law Claims,” Dkt. 2256 and its Reply to “Tyson Foods, Inc.’s Opposition to Plaintiffs’ [sic] Motion for Partial Summary Judgment—Statement of Undisputed Facts (Dkt. No. 2119-2)” filed herein. DKT # 2258,.

and shall meet the conditions and requirements established by subsection B of this section and by rules promulgated by the State Board of Agriculture pursuant to the Oklahoma Registered Poultry Feeding Operations Act. 2 Okla. Stat. § 10-9.7(A). Best Management Practices, include, without limitation, prohibitions on (1) creating an environmental or public health hazard, and (2) contamination of the waters of the state. 2 Okla. Stat. § 10-9.7(B). Best Management Practices also require compliance with such other management requirements in the ODAFF rules implementing the Act. *Id.* In addition, the ORPFO Act contains other applicable requirements, such as (1) “[l]and application rates of poultry waste shall be based on the available nitrogen and phosphorous content of the poultry waste and shall provide controls for runoff and erosion as appropriate for site conditions,” (2) “poultry waste shall only be applied to suitable land at appropriate times and rates,” (3) “[d]ischarge or runoff of waste from the application site is prohibited,” and (4) “[t]iming and rate of applications shall be based on assimilation capacity of the soil profile, assuming usual nutrient losses, expected precipitation, and soil conditions.” *Id.* at (C)(5) & (6)(c).

It is clear from the plain language of the ORPFO Act that all of these standards apply to the land application of poultry waste. Thus, the soil test phosphorus (STP) maximum limits in Code 590 do not override the other provisions of the ORPFO Act and land application of poultry waste must be undertaken in compliance with all its provisions. Even if § 10-9.7 were ambiguous (which it is not) the Court would have to harmonize and give effect to all of its parts, *see AMF Tubescop Co. v. Hatchel*, 547 P.2d 374, 380 (Okla. 1976).

Peterson correctly notes that the applicable rules under the ORPFO Act are intended to control nonpoint source runoff. Brief, p. 12. The rules mirror the statute and contain, among other things, the requirement that: “[r]unoff of poultry waste from the application site is

prohibited.” OAC 35:17-5-5(7)(C). The Legislature and the ODAFF have spoken with one voice, and Oklahoma law flatly prohibits runoff and requires compliance with all of the standards. The maximum application rate found in Code 590 does not authorize land application in violations of the other requirements of the Act and does not permit discharge or runoff of waste from the application site.

Peterson conflates statutes, rules, and measures like Code 590 -- intended to eliminate or reduce nonpoint runoff -- with the actual facts on the ground. The *mere existence* of statutes, rules, or a conservation practice standard like Code 590 does not mean no phosphorus runs off application sites in the IRW, any more than the *mere existence* of speed limits and tax laws mean there are no speeders or tax evaders. Given the overwhelming evidence of runoff in this case, such an argument is disingenuous. For instance, Dan Parrish of ODAFF correctly recognizes what Peterson does not: in complying with the law, there are other matters to be considered in addition to the maximum application rates in Code 590. DKT #2145-18, pp. 117:23-118:1.

III. Evidence from the *Poultry Water Quality Handbook* goes beyond Peterson’s concession that poultry waste contains phosphorus

Peterson admits chicken manure contains phosphates, but then tries to use the *Poultry Water Quality Handbook* to “contravene Plaintiffs’ [sic] claims in this lawsuit.” *See* Brief, p. 10. However, the very exhibit Peterson relies upon supports the State:

Pollution occurs when litter is mismanaged—for example when land applied in quantities that exceed plant needs. As a result, potentially contaminating substances become “available” to the environment. If adsorbed to sediments or dissolved in water, pollutants can be “transported” off site when nutrients, bacteria, or other substances are released to surface drainage or infiltrate beneath the soil in groundwater recharge areas. DKT #2145-13, PIGEON.0629.

Crop production, pastures, rangeland, feedlots and other animal holding areas are sources of 50 to 60 percent of the water quality problems in rivers and lakes. Bacteria, sedimentation, and nutrients are the leading pollutants. DKT #2145-13, PIGEON.0642

Too many nutrients already in the soil or too much waste applied to the land can move with the soil into surface water or through the soil into groundwater until their presence in the water reaches unacceptable levels sufficient to impair water quality. DKT #2145-13, PIGEON.0642

Phosphorus-laden soil or dissolved phosphorus can move via runoff into rivers, lakes, and streams, where it causes excessive plant and algae growth, which in turn depletes the dissolved oxygen content in the water. Phosphorus-enriched waters contribute to fish kills and the premature aging of the water body. In the end, the beauty and use of the waters are seriously curtailed. Even relatively small soil losses may result in significant nutrient depositions in the water. DKT #2145-13, PIGEON.0644

Clearly, the Defendants, including Peterson, have long known the basic science underlying their threat to the waters of the State and Peterson has endorsed that science by adopting the *Water Quality Handbook*.

IV. Peterson's efforts to dispute the State's facts fail.

Peterson attempts to dispute in part the State's count of its birds in the IRW by claiming it supplemented its reported bird numbers, but fails entirely to provide any specific numbers contrary to those computed by the State. Brief, p. 4, Fact ¶ 9(j). The State calculated annual Peterson bird populations ranging from 4.3 million in 2000 to 20.9 million in 2004. DKT #2062, p. 9, Fact ¶ 9(j). Peterson does not effectively dispute these numbers, but, in any event, Peterson had a substantial number of birds in the IRW, and does not know where their waste went, though most waste is applied close to where it is generated. *See* Brief, p. 14, Fact ¶ 40, and DKT #2062, p. 16-17, Fact ¶ 30 and p. 19, Fact ¶ 40, Ex. 40. Peterson's birds generated between 27,970 tons and 44,199 tons of waste in the IRW each year between 2001 and 2006. DKT #2062, p. 14, Fact ¶ 24. Whatever Peterson may claim about not controlling how growers dispose of this waste, *see* Brief, p. 5, the generation of such huge amounts of waste in circumstances where most waste

will be land applied near Peterson's growers' houses gives Peterson knowledge its operations *likely* will pollute and create a nuisance or trespass.

Moreover, while Peterson denies it dictates where its growers' farms are located, it admits that, as "a matter of practical economics," growers' operations are located within 50 miles of Peterson's feed mill in Decatur, Arkansas. *See* Brief, p. 6, Fact ¶ 10(h). Peterson considers the availability of poultry waste "a strong economic incentive" for growers to go into the poultry growing business. *See* Brief, p. 7, Fact ¶ 15 and p. 9, Fact ¶ 25. Because Peterson chose to put its feed mill in Decatur, as a practical matter Peterson dictated that many of its growers were incentivized to grow Peterson birds in the IRW, and Peterson's operations created great quantities of waste there, with the disposal of that waste nearby.

Peterson does not dispute that its contracts with growers were non-negotiable, but claims the State ignores the "legal constraints" of the Packers and Stockyards Act, 7 U.S.C. § et seq. and the Agricultural Fair Practices Act, 7 U.S.C. § 2302, which allegedly require it to treat its growers uniformly. *See* Brief, p. 6, Fact ¶ 12. Peterson neither develops this argument (e.g., identifying what those purported legal constraints might be), nor explains why its contracts uniformly establish such a high level of control over its growers.

Peterson admits that no-till poultry litter applications have occurred in the IRW, *see* Brief, p. 12, responding to State's Motion, DKT #2062, Fact ¶ 35. None of the evidence Peterson cites refutes the balance of the State's Fact ¶ 35, which said that no-till application puts waste in a circumstance where it may be more readily transported.

Incredibly, Peterson claims the State has not demonstrated Peterson has long been aware of the fact that the land application of poultry waste in the IRW presented a serious risk of potential environmental impact due to phosphorus run-off and leaching. *See* Brief, p. 15-16, Fact

¶ 47. This claim flies in the face of (1) the very existence and the contents of the *Poultry Water Quality Handbook*, samples of which are set out above; (2) testimony by its former head of environmental affairs, Ron Mullikin, that: (a) they started gaining awareness of the problems of excess phosphorus in northwest Arkansas in the mid-1990s; and (b) in 1998 he wrote a memo stating there was an environmental need to stop applying poultry waste to local fields because of the loading of the soils, land, and pasture by phosphates and then it getting into the waterways; (3) Peterson's own judicial admission in the *City of Tulsa* case that it was aware in the mid-1990s that phosphorus presented potential problems in the watershed next door to the IRW, *see* DKT #2062, p. 24-25, Fact ¶ 47; and (4) the fact that Peterson was sued in the *City of Tulsa* case on a similar theory in 2001 and settled that case in 2003. Peterson cannot hide from its own corporate knowledge, including knowledge it previously admitted to this Court.

In its Fact ¶ 48 the State set out almost eight pages of references to evidence that the phosphorus in poultry waste generated by Defendants' birds and land applied in the IRW can and does run-off and leach into the waters of the State. *See* DKT #2062, pp. 24-31, Fact ¶ 48. Peterson relies on Tyson's wholly ineffective response² to these facts, *see* Brief, pp. 16-17, and additionally argues that the State has not identified any location where its growers land applied waste. As such proof is unnecessary, this observation is of no import. In the end, Peterson offers no evidence to contradict the fact that phosphorus from its waste gets into the waters of the state. Consequently, it has confessed this fact.

V. The State's causation evidence is entirely consistent with the law

² Tyson admits that phosphorus is contributed to stream water during high-flow events from non-point sources. DKT #2199-2, p. 20, Fact ¶ 42 and p. 24, Fact ¶ 49 (phosphorus is contributed to stream water from multiple sources, including both point and non-point sources). Land applied poultry waste is an obvious nonpoint source of phosphorus. Peterson adopts Tyson's Statement of Undisputed Facts, including these admissions. Brief, p. 1.

Peterson's assertion that the State is attempting to assign liability on the basis of "industry-wide or commodity-based 'nonidentification' or collective liability theories" reflects a fundamental misapprehension of the State's claims and how the State will prove those claims. The State's claims are based upon an indivisible injury caused in part by the conduct of the Peterson.³ The evidence shows that (1) the Peterson has housed significant numbers of birds in the IRW (millions annually), (2) those birds have generated significant amounts of poultry waste (tens of thousands of tons annually), (3) the majority of that poultry waste has been land applied in the IRW, (4) some amount of all land applied poultry waste runs off to the waters of the IRW, and (5) phosphorus and bacteria in this run-off has combined with other phosphorus and bacteria to cause an indivisible injury to the State.

As explained in State's Response to Defendants' Motion for Partial Summary, *see* DKT #2182, when multiple tortfeasors' acts commingle to produce an indivisible injury, they may be held jointly and severally liable even in the absence of concerted action. *See Boyles v. Oklahoma Natural Gas*, 619 P.2d 613, 617 (Okla. 1980). "With respect to environmental nuisances, such as pollution of a stream or pollution of the air surrounding a community, courts have commonly found that such pollution constitutes an indivisible injury." *Herd v. Asarco, Inc.*, 2003 U.S. Dist. LEXIS 27381, at *41 (N.D. Okla. July 11, 2003), *vacated in part by Herd v. Blue Tee Corp.*, 2004 U.S. Dist. LEXIS 30673 (N.D. Okla. Jan. 13, 2004) (citing *Union Tex. Petroleum Corp. v. Jackson*, 909 P.2d 131, 149-50 (Okla. Civ. App. 1995); *Harper-Turner Oil Co.*, 311 P.2d at 950-51; *U.S. v. Pess*, 120 F. Supp. 2d 503 (W.D. Pa. 2000)).

³ That Peterson resorts to a securities case, *In re Williams Securities Litigation*, 558 F.3d 1130 (10th Cir. 2009), and two product liability / negligence cases, *Wood v. Eli Lilly & Co.*, 38 F.3d 510 (10th Cir. 1994) & *Case v. Fibreboard*, 743 P.2d 1062 (Okla. 1987), as the basis for their argument simply underscores just how far off the mark its analysis of causation really is. These cases do not apply to the pollution context at hand.

The Oklahoma courts have repeatedly applied this indivisible injury rationale in pollution cases. In *Union Tex. Petroleum*, the Oklahoma Court of Civil Appeals held that the defendants were jointly and severally liable for an indivisible injury contaminating an aquifer underlying the town of Cyril. In this regard, the Court reasoned:

The single, indivisible injury at issue in this case is the contamination of the town of Cyril's water supply by saltwater used in oil and gas operations. The general rule is that where several persons are guilty of separate and independent acts of negligence which combine to produce directly a single injury, the courts will not attempt to apportion the damage, especially where it is impracticable to do so, but will hold each joint tort-feasor liable for the entire result.

909 P.2d at 149-50. The "indivisible injury" doctrine applies in this case, just as Chief Judge Eagan applied it in *City of Tulsa v. Tyson Foods*:

The injury alleged herein is a single, indivisible injury - the eutrophication of the lakes from excess phosphorus loading. Under Oklahoma and Arkansas law, regardless of whether the claim is one of negligence or intentional tort, where there are multiple tortfeasors and the separate and independent acts of codefendants concurred, commingled and combined to produce a single indivisible injury for which damages are sought, each defendant may be liable even though his/her acts alone might not have been a sufficient cause of the injury.

City of Tulsa v. Tyson Foods, Inc., 258 F. Supp. 2d 1263, 1297 (N.D. Okla. 2003), *vacated in connection with settlement* (citations and internal quotations omitted). In the *City of Tulsa* case, Chief Judge Eagan further determined that: (1) "plaintiffs need not prove the portion or quantity of harm or damages caused by each particular defendant"; and (2) "plaintiffs must show that each defendant contributed to phosphorus loading in the Watershed and that the phosphorus in the Watershed has resulted in the harm and damages sustained by plaintiffs." *Id.* at 1300.

Here, the State suffers a single, indivisible injury of contamination of the waters of the IRW caused by multiple tortfeasors whose separate and independent acts have combined to produce this harm. As such, the State "need not prove the portion or quantity of harm of damages caused by each particular defendant," nor must the State "track" bacteria or phosphorus

from land application sites to surface or groundwater. The *Herd* decision is highly informative in this regard. In *Herd*, lead-laden dust blown from defendants' chat piles and tailings ponds commingled in the air and contaminated the community causing an indivisible injury. In denying the defendants' various motions for summary judgment regarding causation, this Court held:

Once the lead-laden dust reaches the air stream, it is impossible to trace its precise source. The Court therefore finds that the alleged injury is indivisible and that the . . . legal principles regarding joint and several liability apply. To the extent Defendants argue that they are entitled to summary judgment on grounds that Plaintiffs have failed to allege facts that 'trace' or 'quantify' the lead-laden dust causing the alleged nuisance in this case as to each individual Defendant's chat pile(s) or tailing pond(s), the Court finds that, under the facts present here, such tracing or quantification is not required.

Herd, 2003 U.S. Dist. LEXIS 27381, at *41-42.

The *Herd* court also rejected defendants' argument that plaintiffs could not show each defendant contributed to the nuisance:

The record before the Court indicates that Defendants collectively deposited over seventeen million tons of lead-laden mining waste in the Ottawa County area. Although these collective numbers are not conclusive as to any one Defendant's contribution, they clearly inform the issue of contribution, when combined with evidence of the location of Defendant's mining activities in relation to the Picher community. This case is not about a single particle from a chat pile that is miles away from Picher. Therefore, the Court finds that Plaintiffs have met the requisite threshold amount with respect to these Defendants.

Id. at *44-45. Finally, in summing up its opinion on causation, the *Herd* Court explained:

Based on (1) the proximity of the waste materials that resulted from each particular Defendants' mining activities to the alleged area of contamination; and (2) the evidence that will be offered regarding the air dispersion of lead-laden dust from these waste materials, the Court finds that a reasonable jury could conclude that the above-listed Defendants contributed to the nuisance. Thus, Plaintiffs' allegations are not merely 'you mined and therefore you caused the injury,' but instead 'you mined and left waste materials very near the contaminated community and such waste materials have been shown to contain the type of contamination that occurred in the community.' The Court does not view the latter claims as requiring a legally impermissible leap on the causation continuum.

Id. at 45-46. The *Herd* decision is on point. In this case, it is neither possible nor required for the State to trace or pinpoint the precise source of each molecule of phosphorus (or bacterium) that has made its way to the waters of the IRW from Defendants' birds. The State has substantial evidence that *each* of the Defendants -- including the Peterson -- has contributed to the pollution. This is all that is required.

VI. The State's evidence demonstrates that Peterson has contributed to the State's indivisible injury

Peterson's assertion that the State "do[es] not have any evidence linking either Peterson or anyone connected with Peterson to the injuries" alleged is not true. The State's evidence clearly demonstrates that Peterson has contributed to the pollution of the waters of the State. For example, and without limitation, Peterson's birds have generated tens of thousands of tons of poultry waste each year in the IRW. *See* DKT #2062 at Fact, ¶ 24. The vast majority of this poultry waste has been land applied in the IRW. *See* DKT #2062 at Fact, ¶¶ 28, 30 & 32. The geology of the IRW is such that there are ready pathways for the transport of poultry waste and its constituents to surface and groundwater. *See* DKT #2062 at Fact, ¶ 46. Poultry waste is the predominant source of phosphorus loading in the IRW. *See* DKT #2062 at Fact, ¶¶ 43-44. Some portion of land-applied poultry waste is *always* transported from fields to the water. *See* DKT #2062 at Fact, ¶ 48. Run-off from poultry waste is causing injury to the waters of the State. *See* DKT #2062 at Fact, ¶¶ 48-52. This evidence is more than adequate under the indivisible injury doctrine for the purposes of establishing causation with respect to Peterson.

Conclusion

WHEREFORE, the State's Motion for Partial Summary Judgment (DKT #2062) should be granted as to the Peterson.

Respectfully Submitted,

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I hereby certify that on this 19th day of June, 2009, I electronically transmitted the above and foregoing pleading to the Clerk of the Court using the ECF System for filing and a transmittal of a Notice of Electronic Filing to the following ECF registrants:

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